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A LETTER to a *FRIEND*,

Giving some Account of the

PROCEEDINGS

In Her Majesties Court of

QUEENSBENCH

In the CASE of the

Ailesbury Electors :

WITH THE

ARGUMENTS

OF THE

LEARNED JUDGES

*Pro and Con.*



L O N D O N :

Printed for *Benj. Bragge*, at the *Blue-ball* in  
*Ave-Mary-Lane.* 1705.



THE UNIVERSITY OF CHICAGO

PHILIP H. HARRIS

PROFESSOR OF ENGLISH

AND

ARGUMENTS

FOR THE

PROFESSORSHIP

OF ENGLISH

AND

## S I R,

IN Compliance with your Importunity, I have endeavoured to procure as correct a Copy of the Arguments made use of by the Learned Judges of the *Queen's-Bench*, &c. in relation to the Dispute betwixt the Burgesses and Constables of *Ailsbury*, &c. which has been a great part of the Conversation amongst our Friends in Town, since the sitting of the Parliament, which take as follows;

A Complaint was made to the Honourable House of Commons, That since their last Resolutions in the Cause of *Ashby* and *White*, several Actions had been brought by *J. Patty*, *J. Oviat*, *J. Peyton*, and *H. Basse*, and prosecuted by *R. Mead*, against the Constables of *Ailsbury*, in Breach of the Privileges of that Honourable House; whereupon they were pleased to order the Matter of the said Complaint to be heard at the Bar of their House, and ordered the Persons concern'd to attend there, and appointed a Day accordingly.

The Parties appear'd (all but *Mead*) when the Witnesses were examined, and they severally call'd to the Bar of the House, and then withdrew. And upon full hearing, the House were pleas'd to order their Speaker to issue out Warrants for committing them (being taken into Custody) to Her Majesty's Gaol of *Newgate*.

In *Michaelmas* Vacation 1704. they prayed a *Habeas Corpus* upon the Statute of 31. of *Cha. II.* upon the return of which all the Judges met and advised, whether they were bailable by that Statute, who were unanimously of Opinion that they were not, and accordingly they were remanded. And in *Hilary* Term following, they moved the Court of *Queen's-Bench* for a *Habeas Corpus* by the Common Law, which was granted, upon the returns whereof the Judges of the *Queen's-Bench* desired the Assistance of the rest of the Judges, whether they might be discharg'd, who were all of Opinion, except the L. Ch. J. *H—*, that they ought to be remanded: But it was agreed in the *Queen's-Bench* by Council, and afterwards the Judges delivered their Opinion *Seriatim*.

Mr. Justice *G—* and *S. P—*s said they would chiefly insist upon *Lex & Consuetudo Parliamenti*, but they would first maintain the form of the Warrant.

*Obj.* It was objected, that it is not set forth in the Return, how the House of Commons have a Power to commit.

*Ans.* We must take notice of their Power without shewing it.

*Obj.* That this is a Commitment by the Speaker only, for that the Warrant does not run, *Order'd by the Knights, Citizens and Burgesses in Parliament assembled, according to the President in my Lord Shaftsbury Case*, 1 *Mod.* 144.

*Ans.* That it is good, being according to their Form, and that it must be presumed the Speaker's Warrant was by Order of the House.

*Obj.*



*Obj.* There is no Seal to the Warrant, and that every Warrant ought to be under Hand and Seal, or else the Commitment is unlawful.

*Ans.* Courts don't use to commit by Warrant under Seal, but a Justice of Peace must; but they at the Quarter Sessions don't commit under Seal; besides the Custom of Parliament justifies this Warrant.

*Obj.* This is not like my Lord *Shaftsbury's* Case, for he was a Member of the Lords House; also this Commitment is for a Matter done out of the House.

*Ans.* Then they must never commit for Breaches of Privileges, for most are committed by others than their own Members, and for Matters out of the House.

*Obj.* The Duration of the Imprisonment during Pleasure, is illegal and uncertain.

*Ans.* This is made use of for their Advantage, for they are discharged upon the Parliaments rising; but also this Form is according to their Customs. And for Contempts to this Court we commit, without expressing for what time, which is by consequence during Pleasure.

*Obj.* This Commitment is for bringing their Action at Law, and for taking the due Course of Law.

*Ans.* That is Privilege but dispensing with the Law; the generality of Breaches of Privileges, are for taking the due Course of Law. As to the Case of *Ashby* and *White* that is objected, who knows whether this is the same Case, it does not appear to us to be the same, for there may be different Votes, and different Circumstances in this Case; if you go to the meaning the words of a Commitment, Who knows not that most Commitments that would hold for such, do express the Cause but shortly, and that just give a hint; and the Law does presume that the higher Courts do understand what they do, and therefore are not tied up to such strictness as Inferiour Courts.

*Obj.* If this Court of *Queen's-Bench* can discharge a Man committed *per Mandatum Domini Regis*; they may upon a Commitment by any Member or Body of People whatsoever, if not legally committed.

*Ans.* That Commitment is not good, because the King does not Act in person, but hath committed all his *Power Judicial*, some in one Court some in another, so that no Body is to be committed to Gaol upon the King's special Command. But what is done in Court is of greater Authority, and the Law does adjudge it to be done by the King.

*Obj.* Shall the House of Commons take a Despotick Power to regulate how Actions shall be brought, and what Actions shall not be brought.

*Ans.* Can we suppose that High Court would stop the Progress of the Common Law of *England*, 'tis highly dishonourable to have such Thoughts, and no body dares think so, or will presume to say so; and People would laugh at one that should say the House of Commons will take away the Liberties of the People.

There is no better way to determine the Jurisdiction of either House of Parliament, than by Usage and Custom, as the Bounds of Parishes are. That there is no Precedent or Case, nor so much as an Opinion yet cited, that the Court of *Westminster-Hall* have a Power to judge of the Authority of the House of Commons, or that the Orders and Commitment of the House of Commons can be discharged in *Westminster-Hall*, nor ever before attempted to be discharged here, upon such a Commitment by the House of Commons; which is a good

Argu-



Argument, according to my *Ld. Coke's Rule*, that we want Power to do it.

'Twould be impossible for us to judge of the Privileges of the House of Commons, for there are no printed Books of their Privileges, nor is there any Means by which we can attain to the Knowledge of them; but their Customs and Privileges are kept as *Arcana's* in the Rolls and Records of their own House, and their Privileges depend altogether upon Precedents in Parliament; they do judge it is a Contempt and Breach of their Privileges, and who shall say nay? They are proper Judges of the Matter, and upon the Return it appearing, they were committed by the House of Commons, our Jurisdiction ceases; and cited *Prin's Animadversions*, fol. 4. and the King against Sir *John Elliot*, and others in *Cr. Ch.* 181. That upon a Writ of Error in that Case, in the House of Lords, it was resolved, That this Court hath no Jurisdiction of a Misdemeanour committed in Parliament.

Mr. Justice *P---l* said, That this is a Case of the highest Consequence, for it concerns the Privileges of the House of Commons, the Liberty of the Subject, and the Jurisdiction of this Court; 'tis the first Case of this Nature, for the Lord *Shaftsbury* was a Member of the House, and there may be a greater Jurisdiction in some Cases over their own Members, than over Strangers: However, they had not any Authority upon the Return, for they are committed by another Law than we proceed by; and to be committed by one Law, and to judge of the Commitment here by another Law, would be a strange thing: For the House don't commit by the Authority of the Common Law, but by another Law, *Legem & Consuetudinem Parliamenti*; for there are in *England* several other Laws besides the Common Law, *viz.* the Ecclesiastical Law, the Admiralty Law, &c. and there is the Law and Customs of Parliament, where they have particular Laws and Customs for their Directions.

To state Judicature will help to clear this Case: The House of Lords have a Power to judge by the Common Law, but not Originally, but a Dernier Resort upon Writts of Error and Appeals; and for that Reason it is provided by the Constitution for the Judges to give their Assistance, which they are bound to do. But they have another Law, *viz. Lex & Consuetudo Parliamenti*, which the Judges are not to assist in, or give any Opinion; and I dare say, the House of Lords would take it ill, should they meddle or advise therein, for they have their Privileges in their own Rolls and Books.

That the Commons have also a Judicature, not by the Common Law, but do judge of Breaches of Privileges, and Contempts to their House, *secundum Legem & Consuetudinem Parliamenti*, 4 *Infr.* 23. and by this Law these Persons are committed, and now are brought to be discharged by the Common Law. The Resolution of the Commons upon the Breach of Privileges is a Judgment, and the Commitment an Execution of it, which cannot be controll'd; for this would be to draw it *ad aliud Examen*, and then the Commons would not be supream Judges of their own Privileges.

That the Resolution in the House of Lords, in the Case of *Ashby* and *White*, does not bind the House of Commons, nor determine their Privileges; for they judged of the Privileges of the Commons as an

Incident to the Action, and one Court may judge of a Matter within the Jurisdiction of another Court, when without it they cannot determine the Case before them; as this Court may of Admiralty, or Ecclesiastical Jurisdiction, if the Question arises in an Action depending in this Court. But such a Determination will not bind another Court, which has an original Cognizance of that Matter, as in Ejectment now depending in the Common Pleas, the general Issue pleaded and a special Verdict; the Question there is, If a Quakers Marriage be good? Now if it should be held in that Court a void Marriage, and the Judgment should be affirmed in this Court, and upon a Writ of Error in the House of Lords it should be revers'd, this would not bind the Ecclesiastical Court, but they might proceed there for Incontinency; and if they should proceed there to Excommunication, finding it a void Marriage, and the Party taken by the *Excommunicato Capiendo* should bring this *Habeas Corpus* upon the Return of it, we could not discharge him: But this is a Matter originally arising in Parliament.

That this Court may keep other inferiour Courts within their Jurisdictions, but not the House of Commons; for no Prohibition was ever granted to that Court, though they exceeded Jurisdiction: So if the House of Lords do exceed or take Cognizance of Matters in the first Instance, no Prohibition would lye; for no inferiour Court can prohibit a superiour: and no Prohibition was moved here, nor could we have granted it; for the House of Commons is superiour to all ordinary Courts of Law. When the House of Lords took Cognizance, and proceeded upon the Petition of my Lord *Wharton*, complaining of an Order of the Court of Exchequer, for filing the Record of a Survey of the Honour of *Richmond*, and Lordship of *Middleton*; which the House of Commons, upon the Petition of Mr. *Bathurst*, complaining of this Proceeding, Resolved to be without Precedent, and unwarrantable, and tending to the subjecting all the Rights and Properties of the Commons of *England*, to an illegal and arbitrary Power. They also Resolved then, That it is the undoubted Right of all the Subjects of *England*, to make use of the Record; as they ought by Law to have done, before the said Proceeding of the House of Lords, *January 28. 1703.*

In 4 *Inst.* 50. It doth not belong to the Judges to judge of any Law, Privileges, or Customs of Parliament; for the Laws, Customs, Liberties, and Privileges of the Parliament, are better to be learned out of the Rolls of Parliament, and other Records, and by Precedent and continual Experience, than can be expressed by any one Man's Pen.

In 4 *Inst.* Every Court of Justice hath Laws and Customs for its Direction; some by the Common Law, some by the Civil and Cannon Law, some by particular Laws and Customs; so the High Court of Parliament *suis propriis Legibus & Consuetudinibus subsistunt*. That Judges ought not to give any Opinion of a Matter of Parliament, because it is not to be decided by the Common Laws, but *secundum Legem & Consuetudinem Parliamenti*; and Coke says, *Ista Lex ab omnibus est querenda, à multis ignorata, à paucis cognita*. Now who shall adjudge this no Breach of Privilege, when the House of Commons, who are the proper Judges of their own Privileges, have adjudged it to be a Breach of their Privilege.



That it is to no purpose to talk of the Form of the Commitment, if they have not Jurisdiction; but there is no such thing as Seals of the House of Commons, and this Commitment during Pleasure, does not tend to *Villinage* or *Slavery*, as was objected by Mr. M——e, unless there could be a perpetual Parliament, which there can't be now, so that might have been spared; and he was glad *Villinage* and *Slavery* were so much forgot, that Council did not know what it was, or at least did not know how to apply it.

*Obj.* But it was objected, that they do no more in bringing their Action, than what is adjudged by the House of Lords they may lawfully do.

*Ans.* That a good Correspondence is to be wished for between the two Houses, by all true Lovers of their Country; but when they don't agree, there is no way to settle their Jurisdictions, but first by *Conference*, and then by *free Conferences*; and the Lords might have desired a *free Conference*, when the Commons took this Matter under Examination, as the Commons did with the Lords in the Case of *Skinner*, *Coke Rep.* 13. But it may be said, What if one House persists, and the other does so too? as to that, all *free Conferences* are open, and the People of *England* may be present, and will be Judges, and they will not chuse such Persons again as do commit, or do insist upon pretended Privileges; so if the Lords do exceed their Jurisdiction, the Commons may desire a *free Conference*; and if they do persist, the People will be Judges, and will chuse such a Parliament as will deal with them.

That the Lord *Shaftsbury's* Case is an Authority in point of Want of Jurisdiction in that Court, and tho he was a Member of the House it does not alter the Case here, for there are many Instances that the *House of Commons* commit others than their own Members: there have been many Instances in both Houses that they may commit Persons out of the House. *4 Instit.* 23. 24 *Moor* 57. *Ferrar's* Case in *Dyer* and *Plowden*, is a remarkable Instance that no other Punishment could be inflicted for a Breach of Privilege; for he did not know that Indictment would lie for Breach of Privilege; and it would be a strange thing that the House should have Power to Examine into and Judge of a Breach of Privilege, and yet have no Power to punish; for what signifies the Power to judge without the Power to punish.

*L. C. J. H* — said, That this Case does depend upon the Vote that is recited in the Speaker's Warrant of Commitment which was to this Effect;

That it did appear to that Honourable House, that *John Patty* of *Ailesbury* has been guilty of Commencing and Prosecuting an Action at *Common Law* against *W. White* and others, late Constables of *Ailesbury*, for not allowing his Vote in an Election of Members to serve in Parliament, contrary to the Declaration, in high contempt of the Jurisdiction and in Breach of the known Privileges of this House.

That he own'd himself to lie under two Disadvantages; one, That all the rest of the Judges do agree with his three Brethren, from whom he had the Misfortune to dissent. The other, That he oppos'd the Votes of the *House of Commons*, and did begin to think he might justify himself in resigning his Opinion to the rest; but that he valu'd more the Dictates of his

his own Conscience than any thing he could suffer in this World, and by that and his Judgment (tho it were but weak) he would be guided.

That this was not such an Imprisonment as the Freemen of *England* ought to be bound by. And that it did highly concern the People of *England*, not to be bound by a Declaration of the *House of Commons* in a matter that before was lawful.

That neither House of Parliament has a Power separately to dispose of the Liberty or Property of the People, for that can't be done but by the Queen, Lords and Commons, and this is the Security of our *English* Constitution, which cannot be altered but by Act of Parliament.

That there is a Crime charged by the Vote for commencing an Action; but sure that cannot be a Breach of Privilege, for an Original may be filed against a Member of Parliament, during the time of Privilege, so that you dont molest him, and it is no Breach of Privilege; as it was resolved in *Sir George Binion's Case* 14 *Ch. II.* for otherwise, by lapse of time in several Actions, he may be barr'd by the Statute of Limitations; so that if it be not a Breach of Privilege to commence an Action against a Member of Parliament, then how can it be so to commence an Action against the Constable of *Ailesbury*?

But then the Vote goes further, and says, for Commencing and Prosecuting an Action: But Prosecuting may not be a Breach of Privilege neither; for Enttring and Continuing is Prosecuting, which may be done without a Breach of Privilege.

That it does not appear that the Constable of *Ailesbury* has any Privilege above another Person, for no man is presumed to be privileged unless it be shewn; and he has no Privilege as Constable.

That the Vote goes yet further, and says, For not allowing his Vote in an Election of Members to serve in this present Parliament: But this can be no Crime.

That he admitted they were Judges of their own Privileges; but the Law must also be observed. By 2 *Ric. III. fol. 9.* it appears, it was no Crime by the Common Law, to bring an Action, tho never so malicious, false or groundless, where it is adjudged that there is no Punishment for it, because 'twas in a method of Justice; but when Business began to increase, Costs were given against the Plaintiff by 23 *Hen. VIII.* for bringing an Action causelessly. A Peer cannot have a *Scandalum Magnatum*, where there is no Cause for the Action wherein he is charged with Scandal; so much the Law regarded the Right of bringing Actions.

That when Subjects have such a Right to bring Actions, it cannot be stopt by Privilege of Parliament; for no Privilege of Parliament can intend so far as to destroy a Mans Right.

That it has been adjudged a good Action by the Law of the Land, and that Damages may be recovered for the Injury in not allowing his Vote; and this Action is the same as *Ashby* and *White*, which lies before us, and if we consult the Records we shall find it to be the same.

That the latter part of this Vote is, That the Prosecuting this Action is contrary to the Declaration, in high contempt of the Jurisdiction, and in Breach of the known Privileges of this House.

That



That the Privileges of the House of Commons are limited, for there is no Privilege in case of Treason, or Felony, or Breach of the Peace; for a Justice of the Peace may commit a Member for Breach of the Peace, and if he should be indicted for it, his Plea of Privilege would not be allowed.

That nothing can make a Privilege, that was not so before, (for the Breach of which a Man shall lose his Liberty) but an Act of Parliament.

That each House is Judge of their own Privileges, because they are more conversant with the Privileges of their own House; so the Judges decline it. But if they come incidently before the Courts of Law, they must determine it there.

That suppose the House of Commons had not meddled in this Matter, but the Defendants in this Action had pleaded to the Jurisdiction of this Court, that this was a Matter examinable only in the Parliament, and the Plaintiff had demurred, we must then have determined it, and be Judges then of their Privileges.

Coke's 1. Inst. *Lex & Consuetudo Parliamenti ab omnibus querendi multis ignorata, à paucis cognita*; and the Reason 'tis known by, is, because they do not seek for it. We are bound to take notice of the Customs of Parliament, for they are part of the Law of the Land, and there are the same Methods of knowing it, as the Law is in *Westminster Hall*.

In Clarendon's History, part 1. fol. 310. Henry Claydon, an Englishman, a Man of great Probity and Learning; his Observations touching Privileges of Parliament are these;

" It is not to be believed, how many Sober Well-minded Men, who  
 " were real Lovers of the Peace of the Kingdom, and had a full Submission and Reverence to the known Laws, were imposed upon, and had  
 " their Understandings confounded, and so their Wills perverted by the  
 " meer mention of Privilege of Parliament; which, instead of the plain  
 " and intelligible Notion of it, was, by the Dexterity of those *Beautifiers*  
 " and their Agents, and the Sottishness of the People, rendred such a  
 " Mystery as could be only explained by themselves, and intended as far  
 " as they found necessary for their Occasions, and was to be acknowledged a good Reason for any thing that no other Reason could be given  
 " for. We are, say they, and have been always confessed the only Judges  
 " of our own Privileges, and whatsoever we declare to be our Privileges  
 " are such; otherwise whosoever determines that it is not so, makes  
 " himself Judge of that whereof the Cognizance belongs only to us.  
 " And this Sophistical Riddle perplexed many, who, notwithstanding  
 " the desperate Consequence they saw must result from such Logick, taking the first Proposition for true, which being rightly understood, is  
 " so, have not been able to wind themselves out of the Labyrinth of the  
 " Conclusion: I say the Proposition rightly understood, they are the only Judges of their own Privileges, that is, upon the Breach of those Privileges which the Law hath declared to be their own, and what Punishment is to be inflicted upon such Breach; but there can be no Privilege  
 " of which the Law doth not take notice, and which is not pleadable by  
 " and at Law.

The same Part, pag. 312. " But that their being Judges of their Privileges  
 " should qualifie them to make new Privileges, or that their Judgment  
 " should create them such, as it was a Doctrine never before heard of,  
 " so it could not but produce all those monstrous Effects we have seen:  
 " When they have assembled to swallow all the Rights and Prerogatives  
 " of the Crown, the Liberties and Lands of the Church, the Power and  
 " Jurisdiction of the Peers; in a Word, the Religion, Laws, and Liberties  
 " of *England*, in the bottomless and insatiable Gulph of their own Privi-  
 " leges. That he had yet a greater Authority than this, the Opinion of  
 King *Cha. I.* in his Answer to the nineteen Propositions from both Houses  
 of Parliament, in Lord *Clarendon's* History, first Part 498. which Answer  
 is in the King's own Words in *Rushworth's* Collections, 3 Vol. Part the 1st.  
 725. 730. 331.

That tho' the bringing this Action be contrary to the Declaration, it  
 does not follow therefore that it must be a Breach of Privilege, for this  
 Vote has not obtained the Authority of a Law, and they have no more  
 Power to declare the Law, than they have to make a Law.

That if bringing an Action is a Breach of Privilege, why was not *Ashby*  
 laid hold on? he prosecuted to Judgment and Execution, but these Persons  
 are committed for commencing an Action.

How can the bringing an Action in one Court, be a Contempt to an-  
 other?

If a Man that has a Privilege in one Court, is sued in another, he shall  
 have his Privilege, but it is no Contempt in the Plaintiff that he sues in an-  
 other Court, and there is no Punishment for it; much less can it be a Con-  
 tempt to the House of Commons, where no Action can be brought.

That he admitted the House of Commons may commit any Person, and  
 for any Crime, because they may impeach any Person for any Crime what-  
 soever; but that course is seldom taken, unless where the Crime requires a  
 strict Prosecution, and very much concerns the Publick.

That the Lord *Shaftsbury's* Case is not like this; for he was a Member  
 of the House, and it was for a Contempt in the House.

That he did not question but that the Warrant was a good Warrant.

That *Lex & Consuetudo Parliamenti*, is as much the Law of the Land, as  
 any other Law; 'tis the Law gives the Queen her Prerogatives; 'tis the  
 Law gives Jurisdiction to the House of Lords; and 'tis the Law limits the  
 Jurisdiction of the House of Commons.

That if the Ecclesiastical Court exceed their Jurisdiction, a Prohibition  
 will lye; and even the King's Acts, if contrary to Law, are void.

He insisted that the Lord *Banbury's* Case was a great Authority for him.

Mr. *L*——re moved that the Judgment might be enter'd upon Re-  
 cord.

*L. C. J. H.*——asked the Clerk of the Crown how they enter'd the  
 Judgment in these Cases? who answered, that They never make up any  
 Roll, but only enter a *Remittitur* generally upon the back of the Writ.

*L. C. J. H.*——told him that of right he ought to make up a Roll (and  
 as he was informed he had the Fees allowed for making up the Roll) and  
 then bid the Council come to his Chambers and bring Precedents, and  
 afterwards the Judgment was enter'd in this manner:



The Judgment : *Quia Cognitio Causæ Captionis & Detentionis predictæ non pertinet ad Curiam Dominæ Reginae, Ideo Remittitur.*

Thus, Sir, you have the best Account of this Affair I am able to procure; and doubt not but it will prove some Entertainment to your self, and the rest of our Friends in the Country. *I am*

*Tours, &c.*

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*F I N I S.*

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